No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; and SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF TURNER BROADCASTING SYSTEM, INC. AND FINANCIAL NEWS NETWORK IN SUPPORT OF WRIT OF CERTIORARI

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Turner Broadcasting System, Inc. ("TBS"), and Financial News Network ("FNN"), respectfully submit their brief amicus curiae in support of the Writ of Certiorari. Copies of the written consents of Petitioners and Respondent are being filed with this Brief pursuant to Rule 36.

INTEREST OF AMICI CURIAE

TBS is a diversified corporation whose principal holdings include a broadcast television station, two twenty-four hour all news cable television services, and several Atlanta professional sports teams. TBS owns and op-

erates WTBS, a UHF broadcast station licensed to service Atlanta, Georgia, which airs a diverse mix of children's and public affairs, family entertainment, and sports programs. The signal of WTBS is received locally by a Federal Communication Commission ("FCC")-licensed common carrier, and is transmitted by this carrier, via satellite, to over 5,600 cable systems nationwide. Through this combination of satellite and cable systems' retransmission, WTBS is available in over 27.6 million households and has become known as a "superstation": a broadcast station whose signal is received far beyond its local service area.[1]

While WTBS is technically a local Atlanta broadcast station, the fact that it is viewed nationwide by millions of households permits the station to sell advertising time at national rates to companies seeking a national audience. The sale of national advertising is the source of WTBS' revenues. Cable systems do not compensate WTBS directly for the use of its signal on their system.

TBS also owns and operates two non-broadcast cable television news services: Cable News Network (CNN) and CNN Headline News.[2] CNN, which began opera-

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[1] This scheme of retransmission of a broadcast signal by cable systems and common carriers is made possible by the compulsory license system adopted by Congress in the 1976 Copyright Act, 17 U.S.C. § 101, *et seq. See also Eastern Microwave, Inc. v. Doubleday*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 1232 (1983). Section 111 of the Copyright Act establishes a compulsory license system that permits cable systems to rebroadcast the signals of distant broadcast signals (signals originating outside the service area of the cable system) without the permission of the originating broadcast station, provided the cable system pays a royalty fee based on a percentage of the system's gross revenues. 17 U.S.C. § 111(c). These royalty fees are collected by a government agency, the Copyright Royalty Tribunal, and distributed to eligible copyright holders. 17 U.S.C. § 111(d).

[2] Carriage by cable systems of CNN and CNN Headline News is a matter of direct negotiations between CNN and the cable operators; these services are not covered by the compulsory license in Section 111 of the Copyright Act.

tion in 1980, provides over 3,750 cable systems and 21.6 million households throughout the country with twenty-four hour news programming. CNN's unique programming is available solely via cable. Its companion news service, CNN Headline News, launched in early 1982, provides continuous headline summaries of daily national and international news and is currently viewed in over 3.5 million cable homes.[3]

Unlike WTBS, TBS enters into contracts directly with cable systems for carriage of CNN and Headline News. The contract specifically provides that the affiliate may not delete any commercials or other program segment, alter, delay, or in any other manner interfere with the integrity of CNN's transmission. In this way a cable system's affiliation greatly differs from a local broadcast station's affiliation with one of the three major networks, when the local broadcast station provides much of the programming aired. A cable system's involvement is to make an initial editorial judgment about whether or not to carry CNN or Headline News and, having decided to carry the service, it does not then become involved in its program decisions.

All three of TBS' cable program services are carried by cable systems within Oklahoma.[4] All three TBS program

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[3] Both CNN and Headline News originate from studios in Atlanta, Georgia, although both services utilize programming that is produced in other CNN bureaus. Affiliated cable systems do not provide any of the programming that is seen on CNN. This programming is transmitted from Atlanta to a satellite which in turn beams the programming nationwide. A cable system that carries one or both of the services obtains the programming by using a satellite receive earth station.

[4] II R 32-33, 34-35, 53. While the record clearly refers to the carriage of WTBS in Oklahoma, it does not contain any references to carriage of CNN and Headline News. Currently, 112 Oklahoma cable systems serving 361,496 subscribes carry CNN, while 12 cable and broadcast stations serving 173,019 viewers carry Headline News.

services contain advertisements for various brands of wine.[5] As such, their carriage by a cable system in Oklahoma would be illegal, unless the offending commercials were deleted.[6]

FNN produces nationwide, comprehensive, business, finance, market and economic television news programming, now carried by over 600 cable systems, whose subscribership is in excess of 11 million homes. Dedicated cable systems carry FNN's programming 12 hours per day (7 a.m.-7 p.m. EST), Monday through Friday. FNN is also seen on 14 UHF stations who generally carry between five to nine hours of FNN's programming.

FNN is a relatively new cable network, having commenced distribution on November 30, 1981. FNN earns substantially all of its revenues through the sale of advertising time. Under its advertising agreements with its cable affiliates, those cable affiliates may not delete any national commercials or other program segment, alter, delay or in any manner interfere with the integrity of FNN's programming transmission.

FNN is currently on approximately 25 cable systems with a subscribership of approximately 249,678 homes in the state of Oklahoma, as well as on KAVT-TV, Oklahoma City, Oklahoma.

SUMMARY OF ARGUMENT

CNN, CNN Headline News, FNN, and WTBS are cable programmers that provide informational and entertainment programs designed exclusively or primarily for cable television. They and other cable programmers are indisputably engaged in noncommercial speech protected

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[5] II R 33, 39. Again, the record does not contain references to wine commercials on CNN and Headline News, but both services carry such advertisements. WTBS is explicitly cited in the record.

[6] Oklahoma Alcoholic Beverage Control Act, 37 Oklahoma Statutes Ann. § 516 (1982). *See also*, Okla. Const. art. 27, § 5.

by the First Amendment. The Oklahoma alcoholic advertising ban operates effectively to abridge the First Amendment rights of TBS and FNN and to limit the First Amendment rights of the viewing public of Oklahoma by interdicting the transmission of noncommercial speech because it is realistically impossible for cable operators to delete commercials from these program offerings. This damage to the First Amendment rights of cable programmers is particularly serious because cable systems represent such programmers' exclusive means of reaching the public. Hence, for cable programmers Respondent has not left open "ample alternative channels for communication."

Respondent cannot advance a compelling state interest to justify the abridgement of noncommercial speech by cable programmers. The fact that Respondent may have no intent to abridge such speech is irrelevant. The Twenty-first Amendment and the scope of Oklahoma's authority under it do not provide the interest to justify suppression of noncommercial speech.

Even if Oklahoma's interests were regarded as compelling, its abridgement of noncommercial speakers such as CNN cannot be excused in light of Respondent's inconsistent application of that interest. By tolerating wine advertising in other media, Respondent abridges the First Amendment rights of cable programmers by favoring one set of speakers over another. Further, its inconsistent application of the Oklahoma commercial ban clouds the seriousness with which the state views its interests.

ARGUMENT

I. INTRODUCTION

CNN, CNN Headline News, FNN and WTBS are part of a recent phenomenon, cable programmers, made possible by the growth of the cable industry and the development of a satellite-based national cable programming distribution system. Today, this program industry includes over fifty national and regional programming services that provide entertainment and sports programming and specialize in such areas as news, financial, or other informational services, coverage of congressional deliberations, and children's, health, religious and minority-oriented programming.

Some of these cable programmers, such as Home Box Office and The Disney Channel, carry no advertising, and receive their revenues from cable operators, who typically charge cable subscribers a fee for each of these programming services. Many cable programmers, however, sell and air advertising to provide necessary operating revenue. Such advertising frequently includes wine commercials.

Wine commercials cannot be legally deleted by cable systems from WTBS, FNN, CNN or CNN Headline News. First, federal law forbids a cable system from deleting the commercials of a distant broadcast station like WTBS carried on their system. The Copyright Act of 1976 denies cable systems the protection of the compulsory license if they willfully delete commercial advertisements from a broadcast signal they retransmit, 17 U.S.C. § 111(c)(3). The cable operator's contract with TBS regarding carriage of CNN and Headline News and its similar contract with FNN bars the operator from removing commercials. TBS would regard such a deletion as a violation of its CNN and Headline News copyright.

Moreover, the deletion of such commercials from cable programming services, like CNN, is impractical for the cable operator. CNN does not provide notice to cable operators as to when wine commercials will air. In fact, many CNN commercials are not prescheduled, as its schedule is altered as news events warrant. As a technical matter, consequently, the task of deleting specific commercials is nearly impossible.[7] As the district court unambiguously found, "there exists no feasible way for Plaintiffs to block out the [wine] advertisements" carried on the cable program services. *Cable-Com General, Inc. v. Crisp*, Pet. App. at 41a. While acknowledging that "the cable operators especially are placed in a difficult position," *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 502 (10th Cir. 1983), the Tenth Circuit did not disturb this factual finding. Thus, the record clearly establishes that the effect of the Oklahoma statute will be to force upon cable operators the only other alternative: i.e., to drop non-broadcast cable program services, like CNN, FNN, and Headline News, that carry prohibited commercial advertising.

Amici would be thus directly affected by Respondent's enforcement of the Oklahoma statute. If the Tenth Circuit is affirmed, cable systems will most likely be forced by federal law and technological limits to discontinue carriage of all three TBS program services. Thus, the Oklahoma statute and Respondent's enforcement policy will effectively bar all three TBS program services and FNN from the state of Oklahoma.

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[7] The FCC once studied the feasibility of allowing cable systems to delete advertising from distant signals but concluded that the idea was unworkable. *Cable Television Report and Order* (Docket Nos. 18397, et al.) 36 FCC 2d 143, 165 (1972), *aff'd sub nom. American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975). A cable system thus stands in a different technical and contractual position vis-a-vis CNN, FNN and other cable programmers than do broadcast affiliates to their networks. *Compare, Oklahoma Alcoholic Beverage Control Board v. Heublein Wines, International*, 566 P.2d 1158 (Okla. 1977).

Amici agree fully with the contentions of Petitioners that the Oklahoma statute as applied is an unconstitutional restriction on commercial speech, but will not reiterate those arguments here.[8] Amici submit this Brief to raise a separate point—the Oklahoma statute constitutes an unconstitutional abridgement of the dissemination of noncommercial speech by cable programmers.

II. THE OKLAHOMA STATUTE'S BAN ON LIQUOR ADVERTISEMENTS DIRECTLY ABRIDGES THE FIRST AMENDMENT RIGHTS OF CABLE TELEVISION PROGRAMMERS TO PROVIDE, AND OKLAHOMA VIEWERS TO RECEIVE, NONCOMMERCIAL SPEECH

1. Nonbroadcast program services, like those of Amici TBS and FNN, that provide informational and entertainment programming designed exclusively or primarily for cable television systems are indisputably engaged in speech protected by the First Amendment. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952) (motion pictures protected by the First Amendment); *Winters v. New York*, 333 U.S. 507, 510 (1948); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). It is well settled that "[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatical works, fall within the First Amendment guarantee." *Schad v.*

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[8] Amici also agree with Petitioners' arguments that federal law preempts Oklahoma's regulation as it pertains to cable programmers. We also wish to emphasize, as have Petitioners, that the constitutionality of the FCC's so-called must carry rules is currently under challenge in two cases before the United States Court of Appeals for the District of Columbia Circuit. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, D.C. Cir. No. 83-2050 (filed October 4, 1983); *Quincy Cable TV, Inc. v. FCC*, D.C. Cir. No. 83-1283 (filed May 31, 1983).

Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (citations omitted).[9]

The independent First Amendment rights of the public are also at stake in any government effort that interdicts their access to the national "free trade in ideas."[10] Access to diverse programming by the viewing public is, in fact, the "paramount" First Amendment interest in regulation of the electronic media. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). As the Tenth Circuit itself has noted, "the First Amendment interests of cable viewers cannot be left out of the equation for permissible regulation of cable companies." *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981). The First "Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see National Association of Theatre Owners v. FCC*, 420 F.2d 194, 207 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). Public affairs programming, like that offered by CNN, FNN, and Headline News, "is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion," *New York Times Company v. Sullivan*, 376 U.S. 254, 297 (1964), because "speech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

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[9] Even more clearly within the protection of the First and Fourteenth Amendments, are FNN, CNN and Headline News that provide news programming, the type of programming that lies at the core of the First Amendment's concern. *See, Winters v. New York, supra.* WTBS also contains several news programs and substantial amounts of non-entertainment, public affairs programming.

[10] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

The Oklahoma alcoholic advertisement ban operates effectively to eliminate the First Amendment rights of TBS and FNN and to limit severely those of the viewing public in Oklahoma. Unlike local broadcast stations who have the ability to delete national commercials, cable operators will have no choice but to drop these signals, as well as those of other distant broadcast stations and cable program services that carry wine advertising, because it is illegal under federal law for a cable operator to delete commercials from WTBS and both technically impractical and a violation of their contracts to delete them from FNN, CNN and Headline News.

The damage to the First Amendment rights of cable programmers here is particularly serious because, as a practical matter, cable systems represent the exclusive distribution means of speaking to Oklahoma viewers for such programmers. For most cable programmers, and particularly for CNN, Oklahoma's statute and regulations do not "leave open ample alternative channels for communication." *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939). There can thus be no question that Respondent has abridged the rights of noncommercial cable programming speakers by imposing conditions that will effectively bar them from communicating to the State of Oklahoma.

2. Respondent cannot advance a compelling state interest to justify the abridgement of noncommercial speech by cable programmers. The Tenth Circuit erred by analyzing this case as if it presents only an issue of commercial speech, and never examined its impact on noncommercial speech. *See* 699 F.2d 498-502. While, in fact, the intent of the Oklahoma statute may be to regulate only certain commercial messages, its effect is far broader and more severe, wreaking havoc on the

rights of cable programmers to send and the public to receive noncommercial programming. As this Court has made clear, every restriction on commercial speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Products Corp.*, —— U.S. ——, 103 S.Ct. 2875, 2880 (1983). Because the commercials are an integral part of the total cable program and cannot be separated legally or practically, Oklahoma's restriction on commercial speech does suppress speech deserving of greater constitutional protection. A statute which merely bans every fifth word in a book cannot be held harmless when it makes reading the book impossible.

Given this broad effect, Oklahoma's more limited intent cannot excuse its actions. As this Court just recently reaffirmed, "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,"[11] because "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[12] To protect vital speech, the Court must look at the statute's effect as well as its intent when suppression of that speech is "an unintended but inevitable result of the government's conduct . . ." *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (per curiam).

The Tenth Circuit's exclusive focus upon commercial speech does not justify, but helps to explain, its decision. Whereas commercial speech is entitled to lesser protection and provides greater latitude for the furtherance of government interests, *Central Hudson Gas & Electric*

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[11] *Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue*, —— U.S. ——, 103 S.Ct. 1365, 1376 (1983); *see NAACP v. Button*, 371 U.S. 415, 439 (1963); *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Lovell v. Griffin*, 303 U.S. 444 (1938).

[12] *Minneapolis Star and Tribune, supra; see, Schneider v. State*, 308 U.S. 147 (1939).

Corp. v. Public Service Commission, 447 U.S. 557 (1980); *Virginia State Board of Pharmacy, supra*, when government directly restricts discussion of noncommercial topics, "the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980); *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. at 25.

Respondent has not argued that the regulation of alcoholic beverage commercials is undertaken pursuant to a compelling state interest, and the Tenth Circuit's opinion does not rely upon such a theory. Instead, the Tenth Circuit asserts that the interest of Oklahoma in prohibiting the advertising of alcoholic beverages "is substantial." 699 F.2d at 500. Even if such an interest may arguably justify a narrow restriction on commercial speech, it cannot justify the suppression of noncommercial speech that lies at the heart of the First and Fourteenth Amendments.

The Twenty-first Amendment and the scope of Oklahoma's authority under it require no different result. State liquor laws are not immune from constitutional scrutiny. This Court has struck down such laws found in violation of the First Amendment, *Larkin v. Grendel's Den, Inc.*, —— U.S. ——, 103 S.Ct. 505 (1982), the Equal Protection Clause of the Fourteenth Amendment *Craig v. Boren*, 429 U.S. 190 (1976), and federal procedural due process requirements, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).[13] Certainly Oklahoma has asserted no interest so fundamental that it justifies lock-

[13] Liquor laws have also been found wanting under the federal antitrust laws passed under the Commerce Clause, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and the Export-Import Clause, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

ing out the news and public affairs voices of services such as CNN and FNN.[14]

"Regardless of the particular label, . . . a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). The Oklahoma statute, by rendering the carriage of WTBS, CNN, FNN and Headline News impossible or infeasible, has directly infringed upon the First and Fourteenth Amendment rights of TBS and FNN as noncommercial speakers and serves no state interest of sufficient weight to merit it.

3. Even if Oklahoma's interest, *arguendo*, were regarded as compelling, its abridgement of the rights of noncommercial speakers such as CNN cannot be excused in light of Oklahoma's inconsistent application of that interest. Oklahoma's Constitution[15] and state laws[16] forbid anyone or any company from advertising alcoholic beverages within the state. These prohibitions have been interpreted by the state as applying to broadcast stations whose signal originates within Oklahoma,[17] but the Oklahoma Attorney General has not applied this ban to advertising appearing in magazines, newspapers or other print media originating outside Oklahoma, *see Oklahoma Telecasters*, 699 F.2d at 493 n.1, 502, even

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[14] This case is thus much different than those involving "grossly sexual" conduct or control of conduct in establishments licensed to sell liquor where the exercise of Twenty-first Amendment authority was upheld by this Court. *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972).

[15] Oklahoma Constitution, art. 27, § 5.

[16] Oklahoma Alcoholic Beverage Control Act, 37 Oklahoma State Ann. § 516 (1982).

[17] *See Oklahoma Alcoholic Beverage Control Board v. Heublein Wines*, 566 P.2d 1158, 1160, 1162 (Okla. 1977) (upholding this ban as constitutional).

when those periodicals are designed for the Oklahoma market. *See e.g.*, Op. Okla. Att'y Gen. No. 76-348 (Nov. 24, 1976).

On May 19, 1980, the Oklahoma Attorney General revised the state's previous policy and issued an opinion that the prohibition on alcoholic beverage advertising would be applied to cable television, even on those channels originating out-of-state. Op. Okla. Att'y Gen. No. 79-334 (Mar 19, 1980). The opinion was reinforced by oral and written threats by the state to all Oklahoma cable operators, threatening prosecution if they carry such commercials. 699 F.2d at 492.

The State of Oklahoma has in this manner chosen to enforce its alcoholic beverage commercial ban in a selective and discriminatory manner. It has selected only out-of-state originated cable programming amongst all non-Oklahoma media upon which to apply its ban and has exempted all others from its criminal sanctions. This selective and uneven application of a statute in a manner that directly impedes the First and Fourteenth Amendment rights of some speakers, but not others, renders that statute as applied by respondent constitutionally flawed.

Oklahoma thus independently abridges the First Amendment rights of cable programmers by favoring one set of speakers, the print media, over other speakers, cable programmers. The First Amendment forbids governmental efforts to favor one speaker over another. *See Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *First National Bank of Boston v. Belloti*, 435 U.S. 765, 784-85 (1978); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-9 (1976). As this court has recently noted, "[a]lthough the city may dis-

tinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981) (plurality opinion) (citations omitted). By elevating some speakers over others, Oklahoma has created an impermissible hierarchy of noncommercial speech, which has no basis in the record and no place in constitutional law.

Furthermore, Respondent's inconsistent application of the Oklahoma commercial ban raises doubt about the seriousness of the state's interest in utilizing this means to achieve its goal of reducing alcoholic consumption.[18] As this Court has recognized in a similar context, "[t]he exceptions do not create the infringement, rather the general prohibition does. But the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards." *Metromedia, Inc.*, 453 U.S. at 520. *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 73 n.14 (1981). By exempting other media from its prohibition though they stand on similar footing, the state "necessarily has conceded that some communicative interests . . . are stronger than its competing interests. . ." *Metromedia, Inc.*, 453 U.S at 520-21. Yet, Oklahoma cannot justify why one medium can pass this threshold test and others do not.

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[18] This is not one of those unusual instances where the different characteristics of the media involved justify differing treatment. *Compare FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Neither obscenity nor broadcasting's unique accessibility to children, for example, have been put not at issue here. *Id.* Wine advertising in print and on television do not differ greatly. Certainly Oklahoma has asserted no defensible rationale for the distinction, and Respondent is not permitted to advance belatedly such a justification now. *See, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962).

The failure of the state to justify its incomplete pursuit of its alcoholic beverage commercial policy clouds the seriousness with which the state views its interests here. Both the nature of the interest and the state's consistency in pursuing the policy are essential elements in the weighing of conflicting interests. Oklahoma's interests are insufficient, even as described by Respondent, to justify the intrusion into speech occasioned by the statute; diluted by inconsistent and half-hearted application, these interests are overwhelmed by the contrary interests of the public and cable program providers. Hence, the abridgement of the First Amendment rights of cable programmers cannot be sustained.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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